PD-0480-17

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Ex parte Hector Macias

Motion for Rehearing

Appeal from El Paso County

FOR HECTOR MACIAS:

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PD-0480-17
IN THE COURT OF CRIMINAL APPEALS
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Ex parte Hector Macias

HECTOR MACIAS, Appellant

THE STATE OF TEXAS, Appellee

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APPELLANT'S MOTION FOR REHEARING

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Appellant (also Defendant at trial, and Respondent at the Court of Criminal Appeals), Hector Macias, by and through his attorneys of record, Maximino Daniel Munoz, and Mateo DeKoatz, and respectfully submits this Motion for Rehearing in the above entitled and numbered cause.

ARGUMENT AND AUTHORITIES

I.

The Fifth Amendment of the United States Constitution guarantees that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. U.S. CONST. AMEND. V. In a jury trial, jeopardy attaches at the time the petite jury is sworn to render a true and correct verdict. Crist v. Bretz, 437 U.S. 28 (1978). In the instant case, and after jeopardy attached, the trial court indefinitely adjourned the trial and released the jury. Rr2-272-275. Appellant contends that prosecution is now prohibited under the double jeopardy clause of the 5th Amendment. State v. Moreno, 294 S.W. 3d, 594, 597 (Crim. App. 2009). The Fifth Amendment to the United States Constitution prohibits any proceeding that would put a defendant in jeopardy twice for the same offense. Two requirements must be met before double-jeopardy protections are implicated. First, jeopardy must have attached initially. In a state or federal jury trial, jeopardy attaches when the jury is empanelled and sworn. Crist, supra. In the case at bar, the jury was empanelled and sworn. Rr2-93. Second, the Government's proceeding must threaten the defendant with an impermissible successive trial. In the case at bar,

the trial court and State put Appellant to trial, up until moments before closing argument.

One of the "most fundamental rule[s] in the history of double jeopardy jurisprudence" is that a defendant cannot be tried again for that same offense. This long-settled principle prevents the "unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that `even though innocent, he may be found guilty.'" State v. Moreno, 294 S.W. 3d, 594, 597 (Crim. App. 2009).

II.

In the case at bar, before the trial court adjourned the proceedings and released the jury, the State and trial court were made aware that they were subjecting Appellant to a double jeopardy violation by releasing the jury. Rr2-272-275. See, e.g., Benton v. Maryland, 395 U.S. 784 (1969); Fong Foo v. U.S., 369 U.S. 141, 143 (1962). In the case of Fong Foo v. United States, supra, the district judge directed a verdict of acquittal before the Government finished presenting its evidence because of a supposed lack of witness credibility and prosecutorial misconduct. The First Circuit Court of Appeals held that the judge *did not have authority* to

enter a verdict before the Government rested its case. [Emphasis added.] The Supreme Court recognized that the judge's actions were "egregiously erroneous," but nevertheless held that the Double Jeopardy Clause prohibited the court of appeals from setting aside the verdict of acquittal and subjecting the defendant to another trial. Numerous cases after Fong Foo reinforced the principle that the Double Jeopardy Clause bars further prosecution, including prosecution-initiated-appellate review, even if the acquittal resulted from patent judicial error. For example, in Sanabria v. United States, the trial judge excluded certain evidence as irrelevant and then held that the remaining evidence was insufficient. The Supreme Court held that the acquittal for insufficient evidence could not be appealed, even though it resulted from an erroneous evidentiary ruling. Sanabria v. United States, 437 U.S. 54 (1978).

III.

In support of its opinion, the Court of Criminal Appeals cites Serfass v. United States, 420 U.S. 377, 388 (1975). A summary of that case includes: Petitioner, who had submitted a post-induction order claim for conscientious objector status to his local board, was later indicted for willful failure to report for and submit to induction into the Armed Forces. He filed a *pretrial motion*, accompanied by an

affidavit, to dismiss the indictment on the ground that the local board did not state adequate reasons for refusing to reopen his file, and a motion to postpone the trial

"for the reason that a Motion to Dismiss has been simultaneously filed, and the expeditious administration of justice will be served best by considering the Motion prior to trial." The District Court dismissed the indictment, noting that the material facts were derived from the affidavit, petitioner's Selective Service file, and a stipulation that the information petitioner had submitted to the board "establishes a prima facie claim for conscientious objector status based upon late crystallization." The court held that dismissal of the indictment was appropriate because petitioner was entitled to full consideration of his claim before he was assigned to combatant training and because the local board's statement of reasons for its refusal to reopen petitioner's file was "sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in service review." The Government appealed under 18 U.S.C. § 3731. The Court of Appeals, rejecting petitioner's contention that it lacked jurisdiction under § 3731 because the Double Jeopardy Clause barred further prosecution, reversed.

The Supreme Court held that the Double Jeopardy Clause does not bar an appeal by the United States under 18 U.S.C. § 3731 from a pretrial order dismissing an

indictment since, in that situation, the criminal defendant has not been "put to trial before the trier of the facts, whether the trier be a jury or a judge." United States v. Jorn, 400 U. S. 470, 400 U. S. 479. Pp. 420 U. S. 383-394. In light of the language of the then version of § 3731 and of its legislative history, it was clear that Congress intended to authorize an appeal to a court of appeals so long as further prosecution *would not be barred by the Double Jeopardy Clause*. Pp. 420 U. S. 383-387. The concept of "attachment of jeopardy" defines a point in criminal proceedings at which the purposes and policies of the Double Jeopardy Clause are implicated. *Jeopardy does not attach until a defendant is put to trial, which, in a jury trial, occurs when the jury is empaneled and sworn, and, in a nonjury trial, when the court begins to hear evidence*. P.420 U. S. 388. Jeopardy had not attached in this case when the District Court dismissed the indictment, because petitioner had not then been put to trial. [Emphasis added.]

In the case at bar, unlike in Serfass, Defendant-Appellant was placed in jeopardy; the jury was empaneled and sworn. The Court appears to overlook this fact. The Court evades the estoppel issue by stating that both parties could have "easily" ascertained that the mandate had not issued. Appellant was not the court; Appellant was not the prosecutor. Neither the trial court nor the prosecutor

ascertained that the mandate had not issued, yet the Court of Criminal Appeals places the onus upon Appellant. The burden of prosecution is upon the State, not the Defendant. The Court's decision appears to be contrary to the principle that the State was the prosecutor, and the trial court pushed the case to trial, and the burden to prosecute was upon the State—not Appellant. The Court of Criminal Appeals' opinion appears to overlook the burden, expense, time, and anxiety of which the State and trial court have placed upon Appellant. The Appellant's detrimental reliance is patent. The Court's decision places no responsibility upon the State or trial court for going forward and putting Appellant to task: "...it lacked jurisdiction over the case because the appellate mandate had not yet issued."

CONCLUSION

In the case sub judice, Appellant argues that the State and trial court are responsible for the situation at hand; the trial court agreed. Rr2-272. Appellant at bar did not contribute to the procedural error, if any, of impaneling the jury and proceeding through trial, including charging the jury. Rr2-257-265; 273-275. Only the State had the power to prosecute, and only the trial court had the power to place Appellant in jeopardy by swearing in the petite jury. The trial court and

State considered the proceedings below to be a nullity, but Appellant was put to the fight, one which is in no wise taken lightly. The State and the trial court should not get another bite at the apple.

PRAYER FOR RELIEF

Wherefore, Appellant prays that his Motion for Rehearing be granted, and that the El Paso Court of Appeal's judgment be affirmed in all things, and that the prosecution against Hector Macias be dismissed with prejudice based upon the trial court's and State's violation of the Double Jeopardy Clause, 5th Amendment, to the United States Constitution.

Respectfully submitted,

/s/ Max Munoz

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of November, 2017, the Appellant's Motion for Rehearing was served via electronic service provider to:

Mr. Jaime Esparza,
District Attorney
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El Paso, Texas 79901

/s/ Max Munoz
Maximino Daniel Munoz